distribution marketplace to serve as an outlet for diverse programming. In addition, it would enhance competitive parity by ensuring that cable operators and local telephone companies operate under similar regulatory constraints.

Moreover, Congress has often used the phrase "provide video programming" and even the term "transmission" of video programming interchangeably with the term "cable service." For example, in the now-repealed cable-telephone company cross-ownership provision, former Section 613(b)(1),[74] Congress made it unlawful for any local exchange carrier to "provide video programming" directly to subscribers. Interpreting the term "provide video programming," the Fourth Circuit determined that Section 613(b)(1) "essentially prohibits local telephone companies from offering, with editorial control, cable television services to their common carrier subscribers."[75] Indeed, even the "transmission" of video programming has been used to mean the provision of cable service.[76]

Based upon previous use of these terms, it is most reasonable to conclude that Congress used the term "provide video programming" in Section 653(a)(1) to avoid the confusion that would have resulted from use of the term "cable service" in referring to cable

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[74] 47 U.S.C. § 533(b)(1), repealed by the 1996 Act, § 302(b).

[75] Chesapeake & Potomac Telephone Co. of Virginia v. United States, 42 F.3d 181, 185 (4th Cir. 1994), cert. granted, 115 S. Ct. 608 (1995), vacated and remanded sub nom. U.S. v. Chesapeake & Potomac Tel. Co., 134 L.Ed. 2d 46 (1996) ("C&P Telephone").

[76] Thus, the District of Columbia Circuit has defined the term "transmission" of video programming" to implicate "active participation in the selection and distribution of video programming," or cable service. See National Cable Television Ass'n v. FCC, 33 F.3d at 73.

operators offering video programming pursuant to Section 653(a)(1).[77] By constructing a separate regulatory regime under Section 653, Congress plainly meant to distinguish between traditional cable operators -- that are not required to make capacity available to other programmers -- from cable operators operating open video systems -- that must comply with such obligations.[78] The statutory language clarifies that an open video system operated by a non-LEC must meet all OVS obligations.

Permitting cable operators to operate their own open video systems would clearly further the public interest by affording programmers a second non-discriminatory platform for the distribution of their services. Cable operators providing open video systems would also be able to use their significant experience in the video distribution marketplace to enhance the viability of OVS as a distribution medium while continuing to serve as program packagers and editors. Nor would reclassification of a cable system as OVS deprive municipalities of franchise fees.[79]

B. CABLE OPERATORS AND THEIR AFFILIATES SHOULD BE PERMITTED TO PROVIDE VIDEO PROGRAMMING ON LEC OPEN VIDEO SYSTEMS

The basic premise of OVS is that the system is open, non-discriminatory, and available to all programmers on a fair basis. The 1996 Act specifically provides that open video system operators may not discriminate among video programming providers with

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[77] See Anderson v. U.S., 490 F.2d 921, 927 (Ct. Claims), cert. denied 419 U.S. 827 (1974) (statutes must be "construed to avoid absurd and whimsical results unrelated to the Congressional purpose."); Oates v. Nat'l Bank, 100 U.S. 239, 243 (1879) (same).

[78] 47 U.S.C. § 573(b)(1)(B).

[79] See 47 U.S.C. § 573(c)(2)(B).

respect to carriage on an open video system.[80] Except when demand exceeds capacity on an open video system, carriage cannot be restricted to any particular VPP or class of providers. The only limit in the Act is imposed directly on the open video system operator itself: an OVS operator cannot select video programming on more than one-third of its system.[81]

There is no legitimate statutory or policy basis to exclude cable operators or their affiliates from utilizing the open video systems. Restrictions on the identity of video programmers that are permitted to seek carriage on open video systems would fundamentally undermine the Congressional intent in repealing the cable-telephone company cross-ownership restriction. The Fourth Circuit has already determined that a complete ban on access to channel capacity is a drastic measure that implicates the First Amendment.[82]

Unless the Commission expressly states that cable operators and their affiliates may obtain access to channel capacity on open video systems, however, they will likely be excluded from doing so. As noted above, cable operator utilizing OVS capacity are likely to improve the viability of open systems as a distribution vehicle and provide the public with an additional outlet for the operator's programming.[83] Ensuring that cable operators and their

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[80] § 573(b)(1)(A).

[81] § 573(b)(1)(B).

[82] C&P Telephone, 42 F.3d at 201-02.

[83] Similarly, cable programming offered by the broadcast networks offers the public the option of viewing Fox- or NBC-produced fare "over-the-air" or as part of the package of cable services they purchase.

affiliates can utilize the capacity on open video systems will enhance, rather than compromise, competition.

CONCLUSION

For the reasons set forth herein, the Commission should adopt the OVS rules that promote fair competition among all programmers and distributors in the video marketplace.

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CERTIFICATE OF SERVICE

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